STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LADON ROGERS,

Defendant-Appellant.

UNPUBLISHED
January 26, 1999

No. 206773
Kalamazoo Circuit Court
LC No. 90-000456 FH

Before: Hood, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of larceny from a person, MCL 750.357; MSA 28.589, and sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to an enhanced term of twelve to twenty years' imprisonment. He now appeals by delayed leave granted from an order denying his motion for relief from judgment. MCR 6.502. We affirm defendant's conviction and sentence, but remand for entry of a corrected judgment of sentence.

Defendant has forfeited appellate consideration of his fair cross-section and equal protection challenges by failing to advance these challenges at trial before his jury was impaneled and sworn. *People v Hubbard (After Remand)*, 217 Mich App 459, 465; 552 NW2d 493 (1996); *People v Dixon*, 217 Mich App 400, 403-404; 552 NW2d 663 (1996).

Witness Trudy Ramgren's identification of defendant at his preliminary examination was not the product of an impermissibly suggestive pretrial identification procedure. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). Although Ramgren did appear in the courtroom at both the April 3, 1990, and the April 17, 1990, adjourned preliminary examinations, the evidentiary record establishes that she did not see defendant on either occasion.

Moreover, although defendant correctly observes that circumstances arising at a preliminary examination can give rise to a pretrial confrontation so suggestive as to preclude a reliable identification, *People v Solomon*, 391 Mich 767; 214 NW2d 60 (1974), adopting *People v Solomon*, 47 Mich App 208, 216-221; 209 NW2d 257 (1973) (Lesinski, C.J., dissenting), we conclude, having reviewed the totality of the circumstances surrounding Ramgren's identification at the preliminary examination, that

defendant's due process rights were not violated by the identification procedure. *People v McElhaney*, 215 Mich App 269, 286-287; 545 NW2d 18 (1996).

Defendant failed to create a testimonial record in the trial court in conjunction with a motion for new trial or an evidentiary hearing and, therefore, appellate review of his ineffective assistance of counsel claims is limited to deficiencies apparent on the record. *People v Hedelsky*, 162 Mich App 382, 397; 412 NW2d 746 (1987). The record fails to demonstrate that defense counsel rendered constitutionally deficient assistance during trial or that defendant suffered the requisite prejudice to sustain his ineffective assistance of counsel claims. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997); *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991); *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988).

The trial court did not abuse its discretion when it ordered defendant removed from the courtroom and confined to the hallway outside the courtroom for the duration of his trial. *People v Reginald Harris*, 80 Mich App 228, 229-230; 263 NW2d 40 (1977). Although a defendant has a right to be present during trial that is guaranteed by both statute, MCL 768.3; MSA 28.1026, and the Due Process Clause of the Fourteenth Amendment, *People v Gross*, 118 Mich App 161, 164; 324 NW2d 557 (1982); see also *Illinois v Allen*, 397 US 337; 90 S Ct 1057; 25 L Ed 2d 353 (1970), defendant waived his right to be present by engaging in improper and disruptive behavior in the courtroom, *Gross, supra; Harris, supra*.

We decline appellate review of defendant's claim that the trial court abused its discretion by denying him a continuance. Because defendant did not request a continuance, no discretion of the trial court was invoked regarding this matter for this Court to review. *People v Leonard*, 224 Mich App 569, 585 n 6; 569 NW2d 663 (1997).

Defendant failed to preserve for appellate review his claims of prosecutorial misconduct by not advancing timely objections in the trial court. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A miscarriage of justice will not result from our failure to grant the requested relief. *Messenger, supra* at 179-180. Viewed in context, *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994), the prosecutor's references to the criminal activity engaged in by defendant as a "robbery" and to defendant as the "robber" who "robbed" the Perry Drug Store on December 13, 1989, do not reveal an intent to inflame the jury by linking defendant's conduct to a more serious and assaultive offense. Instead, the remarks constitute nothing more than references in the vernacular to the criminal activity engaged in by defendant, as reflected by the fact that several of the eyewitnesses to the larceny used the terms "robbed" and "robbery" during their testimony to convey to the jury the nature of the events they witnessed on December 13, 1989, in the Perry Drug store. Additionally, a review of the other challenged remarks reveals nothing more than proper argument of the evidence and reasonable inferences drawn therefrom as they related to the prosecutor's case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), and of the uncontroverted nature of the fingerprint evidence, *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).

Assuming, without deciding, that the trial court failed to give defendant's motion for relief from judgment the deliberative attention it warranted, such an error was harmless because defendant could not demonstrate that he suffered actual prejudice as defined in MCR 6.508(D)(3)(b)(i), (iii) and (iv). *People v Graves*, 458 Mich 476, 482-483; ___ NW2d ___ (1998).

Finally, defendant is not entitled to resentencing. The trial court considered appropriate factors when fashioning defendant's sentence, *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972); *People v Hunter*, 176 Mich App 319, 321; 439 NW2d 334 (1989); *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985), and adequately articulated on the record its reasons for the sentence imposed, *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987). Moreover, defendant's twelve-year minimum sentence is proportionate and, therefore, does not constitute an abuse of sentencing discretion in light of defendant's four prior felony convictions, his lack of rehabilitative potential as demonstrated by his criminal history, a prior failure to complete parole successfully, and the failure of past criminal punishments to effect change in his behavior, and his disorderly and disruptive behavior during the trial proceedings. *People v Edgett*, 220 Mich App 686, 694-696; 560 NW2d 360 (1996).

Although we affirm defendant's term of imprisonment, we remand for entry of a corrected judgment of sentence reflecting the concurrent nature of the sentence, *People v Nantelle*, 215 Mich App 77, 79; 544 NW2d 667 (1996), and for the transmittal of a corrected judgment of sentence to the Department of Corrections.

Affirmed. Remanded for entry of a corrected judgment of sentence. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Janet T. Neff
/s/ Jane E. Markey